Supreme Court, U.S.
FILED
OCT 1985
JOSEPH F. SPANIOL, JR.
CLERK

(7)

No. 84-1362

In the Supreme Court of the United States

OCTOBER TERM, 1985

PUBLIC SERVICE COMMISSION OF MARYLAND, PETITIONER

v.

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION AS AMICUS CURIAE SUPPORTING RESPONDENT

CHARLES FRIED
Acting Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JACK D. SMITH
General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

JOHN E. INGLE
Deputy Associate General Counsel

JANE E. MAGO
Counsel
Federal Communications Commission
Washington, D.C. 20554

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a state regulatory commission or its individual members are "persons" under 47 U.S.C. 401(b), which provides for enforcement of orders of the Federal Communcations Commission against "any person."

2. Whether an order issued by the Federal Communications Commission declaring that state regulatory commissions may not require telephone companies to use depreciation methods other than those prescribed by the FCC is an "order" under 47 U.S.C. 401(b), which provides for enforcement of "any order of the Commission, other than for the payment of money."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1362

PUBLIC SERVICE COMMISSION OF MARYLAND, PETITIONER

v.

CHESAPEAKE AND POTOMAC TELEPHONE
COMPANY OF MARYLAND

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT*

**BRIEF FOR THE FEDERAL COMMUNICATIONS
COMMISSION AS AMICUS CURIAE
SUPPORTING RESPONDENT**

INTEREST OF THE FEDERAL COMMUNICATIONS COMMISSION

Orders of the Federal Communications Commission are subject to enforcement in federal district courts pursuant to 47 U.S.C. 401(b). Petitioner seeks (1) to limit the "persons" against whom enforcement may be had to exclude state regulatory commissions and their members and (2) to limit the "orders" that may be enforced to exclude rulemaking orders. In the FCC's view, acceptance of either of petitioner's contentions would interfere with effective enforcement of its actions.

STATEMENT

The FCC regularly prescribes depreciation rates specifically for respondent, the Chesapeake and Potomac Telephone Company of Maryland (C&P). In 1983, the

FCC declared, in its "*Preemption Order*" (*In re Amendment of Part 31, Uniform System of Accounts*, 92 F.C.C. 2d 864; J.A. 17-49), that state regulatory commissions could not order telephone companies to use depreciation methods contrary to those prescribed by the FCC. At the same time, the FCC ruled, in a proceeding involving depreciation rates for C&P, that FCC depreciation orders are binding at both federal and state levels. *In re Prescription of Revised Percentages of Depreciation*, 92 F.C.C.2d 693, 700 (1982). Petitioner, the Public Service Commission of Maryland, nevertheless refused to permit C&P to follow the depreciation rates prescribed by the FCC in state ratemaking proceedings. C&P then filed an enforcement action in the United States District Court for the District of Maryland, pursuant to 47 U.S.C. 401(b), asking that Court to compel the Maryland commission to permit C&P to use the depreciation methods and rates prescribed by the FCC.[1] The district court issued a preliminary injunction requiring the Maryland commission to follow the FCC's orders (Pet. App. 11a-23a). The Fourth Circuit affirmed (Pet. App. 1a-10a).

1. Most telephone companies are subject to regulation by both state and federal authorities. State commissions regulate intrastate services, while the FCC oversees interstate services. The commissions, both state and federal, base their rate regulation in part on the costs of facilities used to provide service within their respective jurisdictions.[2] Telephone companies are therefore subject to accounting rules and depreciation requirements that are essential to the performance of the regulatory agencies' ratemaking functions. Those rules, in turn, affect the telephone companies' ability to modernize their facilities.

The Communications Act of 1934 gives the FCC authority to establish a uniform system of accounts for common carriers and to prescribe rules to govern the depreciation of common carrier facilities. 47 U.S.C. 220; see *American Telephone & Telegraph Co.* v. *United States*, 299 U.S. 232 (1936). Section 220(b) states that carriers "shall not" use any depreciation procedures other than those prescribed by the FCC. In 1980 and 1981, the FCC adopted two substantive orders changing its regulations that govern the depreciation of certain telephone company plant.[3] It concluded that the prior prac-

[1] Section 401(b) provides:

> If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

[2] The costs of facilities, most of which are used interchangeably for intrastate and interstate calls, are divided among the jurisdictions in accordance with procedures established by the FCC in cooperation with the state commissions. 47 U.S.C. 221(c), 410(c).

[3] In the first of the orders, the Commission accepted the use of "equal life group" and "remaining life" depreciation methods as a means of conforming the regulatory treatment of plant depreciation more closely to the actual decline in value and eventual retirement of that plant. *In re Amendment of Part 31, Property Depreciation*, 83 F.C.C.2d 267 (1980), reconsideration denied, 87 F.C.C.2d 916 (1981). In the second order, the FCC decided that it no longer would treat expenditures for "inside wiring" of residences and businesses as a capital investment subject to inclusion in the rate base and to depreciation. Instead, it would treat those costs as current expenses that the carrier would recover as part of its revenue requirement in the year in which they were incurred. *In re Amendment of Part 31, Uniform System of Accounts*, 85 F.C.C.2d 818 (1981).

tices had led to out-of-phase capital recovery and misallocation of costs, which conflicted with the FCC's policy of encouraging competition, and that they otherwise were inconsistent with the public interest.

At the request of state commissions and telephone companies, the FCC then considered whether its depreciation decisions preempted inconsistent depreciation practices in state ratemaking proceedings. After first deciding that state commissions were not preempted (*In re Amendment of Part 31, Uniform System of Accounts*, 89 F.C.C.2d 1094 (1982)), the FCC unanimously determined on reconsideration that state commissions must conform to the FCC's recent depreciation decisions if the purposes of those decisions were not to be frustrated (J.A. 17-49). The FCC also determined in its *Preemption Order* that Section 220(b) as a matter of law ousted the states from any role in setting depreciation rates for telephone equipment that is used in part for interstate services unless the FCC expressly has authorized such a role (J.A. 40). The FCC concluded that "inconsistent state prescribed depreciation rates are preempted by the Communications Act and are accordingly void" (J.A. 39). The FCC gave general notice of its *Preemption Order* to carriers and to the public by publication in the Federal Register (J.A. 41). It gave particular notice to each of the state commissions by serving copies of the order on them (*ibid.*).

The FCC prescribed new depreciation rates specifically for C&P in December 1982 after a proceeding in which the Maryland commission was an active participant. *In re Prescription of Revised Percentages of Depreciation*, 92 F.C.C.2d at 697, 698-699. The Commission made this prescription only after (1) reviewing the carrier's filings; (2) making its own independent analysis and recommendations; and (3) receiving and considering comment from representatives of C&P and the Maryland commission. *Id.* at 696. In its order, which was adopted the same day as the *Preemption Order*, the FCC reiterated its ruling that federal depreciation orders "are binding at both the federal and state levels" (*id.* at 700).

2. A decision of the FCC, such as the *Preemption Order* or an order prescribing depreciation rates for C&P, is subject to agency reconsideration and to judicial review, at the instance of any person aggrieved by the decision, in the federal courts of appeals. 47 U.S.C. 405, 402(a); 28 U.S.C. 2342(1). The court of appeals for the circuit in which petition for review is filed has "exclusive jurisdiction to make and enter * * * a judgment determining the validity of * * * the order of the agency." 28 U.S.C. 2349(a). The court of appeals may stay or enjoin the operation of the FCC's order pending judicial review, on a proper showing. 28 U.S.C. 2349(b); Fed. R. App. P. 18. Under the Communications Act, FCC orders remain in force until the FCC or "a court of competent jurisdiction" issues a superseding order. 47 U.S.C. 408.

The Maryland commission did not seek review of the FCC order prescribing depreciation rates for C&P. The Virginia State Corporation Commission filed a petition for review of the *Preemption Order* in the Fourth Circuit. The Maryland commission did not intervene or participate in that review proceeding, although more than twenty other state commissions did. No party sought a stay of the FCC's order in that court. The Fourth Circuit affirmed the *Preemption Order* in June 1984. *Virginia State Corporation Commission* v. *FCC*, 737 F.2d 388. This Court has agreed to review the Fourth Circuit's affirmance of the *Preemption Order* and will hear oral argument in that case in tandem with this case. See *Louisiana Public Service Commission* v. *FCC*, No. 84-871.

3. This case arose in February 1983 when the Maryland commission refused to permit C&P to use the depreciation rates prescribed by the FCC in calculating

intrastate rates. C&P had argued on the basis of the *Preemption Order* that it was required to use the depreciation rates set by the FCC. The Maryland commission concluded that the FCC lacked authority to preempt and it refused to permit C&P to calculate its rates in accordance with the FCC's depreciation prescription (J.A. 62-70).

C&P filed a complaint in the United States District Court for the District of Maryland, pursuant to Section 401(b), seeking an injunction directing the Maryland commission to permit the company to use the rates prescribed by the FCC. As several other courts had done in similar cases,[4] the district court issued the injunction, requiring the Maryland commission "to abide by the FCC's [Preemption] Order regarding depreciation rates" (Pet. App. 12a).

The Fourth Circuit unanimously affirmed (Pet. App. 1a-10a), specifically rejecting the two arguments that

---

[4] *E.g., Wisconsin Bell, Inc.* v. *Public Service Commission,* No. 84-C-4 (E.D. Wis. Nov. 13, 1984), appeal pending, No. 84-3110 (7th Cir.); *Northwestern Bell Telephone Co.* v. *Iowa State Commerce Commission,* No. 83-688-A (S.D. Iowa Sept. 27, 1984); *Mountain States Telephone & Telegraph Co.* v. *Department of Public Service Regulation,* 588 F. Supp. 5 (D. Mont. 1983); *New England Telephone & Telegraph Co.* v. *Public Utilities Commission,* 570 F. Supp. 1558 (D. Me. 1983), rev'd, 742 F.2d 1 (1st Cir. 1984), petition for cert. pending, No. 84-900; *South Central Bell Telephone Co.* v. *Louisiana Public Service Commission,* 570 F. Supp. 227 (M.D. La. 1983), aff'd, 744 F.2d 1107 (5th Cir. 1984), appeal pending, No. 84-870; *Southwestern Bell Telephone Co.* v. *State Corporation Commission,* No. 83-4090 (D. Kan. Apr. 8, 1983), appeal pending, No. 84-2295 (10th Cir.); *Pacific Northwest Bell Telephone Co.* v. *Washington Utilities & Transportation Commission,* 565 F. Supp. 17 (W.D. Wash. 1983), appeal pending, No. 83-3746 (9th Cir.). See also *Southwestern Bell Telephone Co.* v. *Arkansas Public Service Commission,* 738 F.2d 901 (8th Cir.), rev'g, 584 F. Supp. 1087 (D. Ark. 1984), petition for cert. pending, No. 84-483. Contra *New England Telephone & Telegraph Co.* v. *Public Service Board,* 576 F. Supp. 4[illegible] (D. Vt. 1983), vacated as moot, No. 84-7051 (2d Cir. Dec. 5, 1984). Cf. *Illinois Bell Telephone Co.* v. *Illinois Commerce Commission,* 740 F.2d 566 (7th Cir. 1984).

the Maryland commission presses in this Court. The court of appeals first rejected the Maryland commission's argument that the defendants named by C&P are not persons within the meaning of Section 401(b). The court stated that the argument "is without merit because C&P's suit for preliminary injunction named not only [the Maryland commission] but also the officials comprising [the Maryland commission] as defendants. Thus, even if [the Maryland commission] is not a 'person' within the meaning of Section 401(b), [the Maryland commission]'s officials are expressly covered by that section" (Pet. App. 4a). The court also stated that "[the Maryland commission] must be considered a 'person' within the meaning of Section 401(b)" because a "contrary interpretation would undermine the Federal Communications Act by rendering [the Maryland commission] and other communications 'entities' immune from enforcement actions by the FCC under Section 401(b)" (*ibid.*).

The court also rejected the Maryland commission's argument that the *Preemption Order* is not an "order" within the meaning of Section 401(b). The court noted that the *Preemption Order* had been reviewed by the Fourth Circuit at the request of state commissions pursuant to 47 U.S.C. 402, which "only provides for review of FCC 'orders'" (Pet. App. 5a). If the *Preemption Order* is an order for purposes of review under Section 402, then, the court reasoned, it is necessarily an order for purposes of enforcement under Section 401.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress created the FCC for the purpose of centralizing, in one agency, the task of overseeing the communications industry in the United States and developing communications policies for wire and radio on an integrated basis. H.R. Rep. 1850, 73d Cong., 2d Sess. 3 (1934). It gave the Commission "a comprehensive mandate" (*Na-*

tional Broadcasting Co. v. *United States*, 319 U.S. 190, 219 (1943)), directing the agency to use its authority to make available a "rapid, efficient, Nation-wide, and world-wide wire and radio communication service." 47 U.S.C. 151.

Section 401 of the Communications Act is the principal section governing enforcement of the Act and of FCC orders entered in the exercise of authority granted by the Act.[5] Section 401(a) provides that the federal government may seek to enjoin violations of the Act itself "by any person" in the federal district courts. Section 401(b) provides that the federal government "or any party injured thereby" may seek enforcement of FCC orders in the federal district courts "if any person fails or neglects to obey any order of the Commission other than for the payment of money." Thus, Section 401(b) applies broadly to *any* person and to *any* order other than for the payment of money.

Petitioner argues that the enforcement provisions of the Act do not apply to it because neither it nor its individual members are "persons" under Section 401. The Act, however, expressly defines "person" to include "individuals" (47 U.S.C. 153(i)), so the individual members of the Maryland commission are clearly "persons." Moreover, while Section 153(i) does not mention state commissions in its list of what the term "person" includes, it does not exclude them either. State commissions are considered "persons" under other sections of

[5] Separate judicial enforcement mechanisms exist (1) for the resolution of certain complaints for damages against common carriers (as an alternative to agency resolution of those complaints), 47 U.S.C. 207; (2) for the consideration of mandamus petitions to compel common carriers to provide service on nondiscriminatory terms, where violation of the Act is alleged, 47 U.S.C. 406; (3) for the enforcement of FCC orders requiring the payment of money, 47 U.S.C. 407, 504(a); and (4) for the enforcement of FCC subpoenas, 47 U.S.C. 409(g). In addition, criminal penalties are available for some violations of the Act or FCC regulations. 47 U.S.C. 501, 502.

the Act. It is sensible to consider them persons under Section 401 as well since, otherwise, state commissions may frustrate national communications policy.

Petitioner also argues that, because the *Preemption Order* is the product of a rulemaking proceeding, it is not an "order" under Section 401(b). Petitioner argues that only adjudicatory orders can be enforced under Section 401(b). Petitioner concedes that orders resulting from rulemaking proceedings are "orders" under Section 402, which governs judicial review. The natural and sensible reading of the statute, we submit, requires the word "order" to be given the same meaning in Section 401(b) as in its neighboring provision. Private enforcement of rulemaking orders helps to effectuate the purposes of the Act, without interfering with the FCC's role in formulating national communications policy. The FCC performs its responsibilities under the Act through a combination of general, self-executing orders, such as the *Preemption Order*, and more detailed orders, such as the order prescribing depreciation rates to be followed by C&P. The FCC is thereby enabled to implement the statutory policies with greater efficiency. It is, accordingly, essential to the statutory scheme for the Act's enforcement provisions to apply to both categories of orders.

I. STATE UTILITY COMMISSIONS AND THEIR INDIVIDUAL MEMBERS ARE "PERSONS" SUBJECT TO ENFORCEMENT PROCEEDINGS UNDER SECTION 401(b) OF THE COMMUNICATIONS ACT

In plain terms, Section 401 provides jurisdiction in the federal district courts sufficient generally to prevent "any person" from thwarting the goals of the Communications Act either by direct violation of its terms or by disobeying an FCC order. "Person" is defined elsewhere in the Act to "include[] an individual, partnership, association, joint-stock company, trust, or corporation." 47

U.S.C. 153(i). Petitioner argues that neither the individual commissioners nor the state commissions are "persons" under Section 401(b).[6]

A. The Definition Of "Person" Clearly Includes Individual Commissioners And Does Not Exclude State Commissions

1. As the court of appeals concluded, the individual commissioners named as defendants in this case are "persons" under Section 401(b) of the Act. "Individuals" are specifically listed among the persons enumerated in Section 153(i). Therefore, if we assume that " 'the legislative purpose is expressed by the ordinary meaning of the words used' " (*Kosak* v. *United States*, No. 82-618 (Mar. 21, 1984), slip op. 5, quoting *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982), and *Richards* v. *United States*, 369 U.S. 1, 9 (1962)), the individual members of the Maryland commission are "persons." Individual state officials acting in their official capacities have traditionally been subject to injunctive actions to enforce federal rights, even where actions against the states themselves would be unavailable. See, *e.g.*, *Kentucky* v. *Graham*, No. 84-849 (June 28, 1985), slip op. 9-10 & n.18; *Scheuer* v. *Rhodes*, 416 U.S. 232, 237 (1974); *Ex parte Young*, 209 U.S. 123 (1908). The plain meaning of Sections 153(i) and 401(b) accordingly refutes petitioner's contention that its members are not "persons," and petitioner can point to nothing in the Act's legislative history to show that Congress did not intend the words of the statute to have their ordinary meaning.

[6] This argument has been rejected by the Fourth Circuit (Pet. App. 4a), the Fifth Circuit (744 F.2d at 1115-1116), and four district courts (Maryland, Pet. App. 16a-17a; Montana, 588 F. Supp. at 7; Maine, 570 F. Supp. at 1567; and Louisiana, 570 F. Supp. at 236). The Vermont district court accepted the argument (576 F. Supp. at 493-496).

2. State commissions should also be considered persons under the Act.[7] The Act's definition of "person" does not exclude state commissions: the illustrative list of persons in Section 153(i) is inclusive rather than exclusive. See *Pfizer, Inc.* v. *India*, 434 U.S. 308, 312 n.9 (1978); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 189 (1941). Nonetheless, petitioner argues (Br. 14) that the fact that neither Section 401(b) nor Section 153(i) specifically includes state commissions is evidence of a congressional intention to exclude them. Quite the opposite conclusion is warranted. When Congress wanted to make particular exceptions in the Communications Act, it did so explicitly. For example, it specifically withdrew orders for the payment of money from the scope of Section 401(b). Similarly, Congress explicitly exempted governmental entities from certain li-

[7] This case does not raise the kinds of Eleventh Amendment policy concerns that this Court addressed in *Atascadero State Hospital* v. *Scanlon*, No. 84-351 (June 28, 1985). There, the Court reiterated the principle that exceptions to the general immunity of states from damage suits by private parties in federal court, established by the Eleventh Amendment, will be found only where Congress has specifically stated its intention to authorize such suits. First, enforcement suits under Section 401(b) are not suits for damages—indeed, Section 401(b) specifically *excludes* suits for enforcement of orders requiring the payment of money—but for injunctive relief. Under *Ex parte Young*, *supra*, state officials are regularly sued for injunctive relief. See *Quern* v. *Jordan*, 440 U.S. 332, 337 (1979) (Eleventh Amendment concerns are not implicated in cases seeking injunctive relief). Second, although the enforcement suit in this case was brought by a private party, Section 401(b) does not distinguish between private parties and the federal government in authorizing enforcement suits and conferring district court jurisdiction. The Eleventh Amendment does not bar suits by the federal government against a state. *United States* v. *Mississippi*, 380 U.S. 128, 140-141 (1965). If the term "person" is not to mean two different things in Section 401(b), depending on who the plaintiff is, using Eleventh Amendment policy considerations to construe "person" to exclude state commissions would deprive the FCC of the only procedure it has under the Act for judicial enforcement of the great majority of its orders against state agencies.

censing provisions. See 47 U.S.C. 302a(c) ("[t]he provisions of this section shall not be applicable * * * to devices or home electronic equipment and systems for use by the Government of the United States or any agency thereof"). An inference that Congress intended to exclude state agencies from the Act's comprehensive equitable enforcement provisions cannot justifiably be based on the absence of specific mention of such agencies where the "naturally broad and inclusive" meaning of the word "person" suggests their inclusion. See *Pfizer, Inc.*, 434 U.S. at 312.

Petitioner's argument (Br. 11-12) that state commissions should be excluded from the definition of "person" in Section 153(i) because a separate subsection, 47 U.S.C. 153(t), defines "[s]tate commission," is unconvincing. As one district court concluded, this argument "overstates the rigor of the definitional structure of the Act" (*New England Telephone & Telegraph Co.*, 570 F. Supp. at 1567).[8] Section 153, 47 U.S.C. (& Supp. I) 153, provides that its definitions apply "unless the context otherwise requires." Moreover, Section 153(i) is one of only five terms in Section 153 whose definition states what the term "includes" rather than what it "means." "Clearly, where the context of the use of the word 'person' requires that a state commission be considered a person, the section contemplates that that term has sufficient scope to embrace a state commission" (570 F. Supp. at 1568).

Petitioner also argues (Br. 13-14) that state commissions are "substantially different" from the types of entities listed in Section 153(i) and thus implicitly are excluded from the concept of "persons" under the definition. This Court has held that state agencies may be "persons" in instances in which the statutory definition of that term does not explicitly include public entities, and, indeed, where the examples given are substantially different in many respects from state agencies. See, *e.g.*, *Ohio* v. *Helvering*, 292 U.S. 360, 370 (1934) (state liquor authority is a person under Internal Revenue Code, which defined that term to mean and include "a partnership, association, company or corporation, as well as a natural person"). Under *Georgia* v. *Evans*, 316 U.S. 159, 161 (1942), whether the term "person" includes entities such as state commissions depends on its "legislative environment," which includes the structure of the Act, its legislative history, and practice and judicial rulings under the Act.[9]

---

[8] In reversing that decision, the First Circuit did not directly address the "person" issue. *New England Telephone & Telegraph* v. *Public Utilities Commission, supra* (Pet. App. 24a). It did, however, assume that state commissions are persons under Section 401 in suggesting that telephone companies could enforce FCC adjudicatory orders against state commissions under Section 401(b) (Pet. App. 38a).

[9] The Maryland commission also points out (Br. 14-15) that 47 U.S.C. 208 authorizes "[a]ny person, any body politic, or municipal organization, or State commission" to complain to the FCC about any action by a common carrier in violation of the Act. The Maryland commission contends that this language in Section 208 shows that Congress did not consider a state commission to be a person under the Act. Section 208 is better understood as an instance in which Congress wanted to be absolutely clear that governmental entities who might want to act on behalf of their citizens could file complaints with the FCC against carriers. Without such specificity, carriers might have argued that those bodies lacked standing to file complaints because they would not likely be injured in their own right by carrier actions. Stated differently, the redundancy in Section 208 was necessary to resolve possible doubts about the standing of state commissions to file complaints with the FCC. It is noteworthy that 47 U.S.C. 221(a) directs the FCC to provide notification "to the State commission * * * and to such other persons as it may deem advisable" when telephone companies apply for permission to consolidate. This language suggests that Congress thought of state commissions as "persons." In the final analysis, neither Section 208 nor Section 221(a), which point in different directions, is dispositive of the proper construction of Section 401(b).

B. The Legislative Structure And Context Support The Conclusion That State Commissions And Their Members Are "Persons" Under Section 401(b)

It is clear, and long established as a matter of practice, that the term "person" in many sections of the Communications Act includes states and their agencies. For example, in Section 301, Congress directed the FCC to provide for the use of radio channels by "persons." 47 U.S.C. 301. Many states and state agencies have licenses, and they would not likely contend that they are not "persons" eligible to obtain radio licenses. Nor are the states likely to contend that they are not "persons" for the purposes of Section 405 of the Act, which permits "any party * * * or any other person" to seek reconsideration of an FCC order. In fact, the California state commission filed such a petition in response to the FCC's substantive depreciation orders that are the origin of this case. See *California PUC Petition for Reconsideration*, Docket No. 79-105 (filed Apr. 29, 1981).[10]

There are several reasons why state commissions should be considered "persons" under Section 401(b) as well. The legislative history shows that Congress modeled Section 401(b) on Section 16(12) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 16(12) (repealed 1978). S. Rep. 781, 73d Cong., 2d Sess. 9 (1934); H.R. Rep. 1850, 73d Cong., 2d Sess. 7 (1934). There was, however, one highly significant change. Section 16(12) provided for relief "[i]f any carrier fails or neglects to obey any order of the Commission other than for the payment of money." Congress copied this phrase verbatim, except that it substituted "person" for "carrier." The committee reports do not explain the reason for

[10] Moreover, state commissions may seek review of orders such as the *Preemption Order* in the courts of appeals. As we argue, pages 20-21, *infra*, it logically follows that they ought to be subject to enforcement as well.

this change. But, in a scheme where the FCC, state commissions, and private carriers are principal actors, and the FCC has primary responsibility, it is reasonable to assume that Congress contemplated that its use of the broad term "person" (in preference to the model statute's term "carrier") would reach the state commissions. Surely, if Congress had intended otherwise, some explanation would have been needed to show that the broad term "persons" did not include state commissions or their members. Yet nothing in the legislative history indicates that Congress meant to exclude state commissions.

Section 401 creates general jurisdiction in the federal courts to enforce the Communications Act and the FCC's orders.[11] If neither state commissions nor their individual members are persons under Section 401, then the FCC, as well as private parties, would lack explicit authority to enforce the Communications Act and FCC orders against state commissions in federal courts. The efficacy of this provision would be undermined if state commissions were not subject to enforcement of orders requiring their compliance since state commissions can undermine the goals of the Communications Act by refusing to comply with such orders. Indeed, in recent years, a number of state commissions have resisted the competitive policies adopted by the FCC. In all but one instance in which the FCC has found its policies preemptive of inconsistent state regulation, reviewing courts have upheld the FCC's actions. See, *e.g.*, *North Carolina Utilities Commission* v. *FCC*, 537 F.2d 787 (4th Cir.), cert. denied, 429 U.S. 1027 (1976); *North Carolina Util-*

[11] FCC orders do not require enforcement action to become binding, but take effect by operation of law and are binding "until the Commission or a court of competent jurisdiction issues a superseding order." 47 U.S.C. 408. See also 47 U.S.C. 416(c); *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407, 420 (1942).

ities Commission v. *FCC*, 552 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874 (1977); *Computer & Communications Industry Association* v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).[12] The FCC and interested private parties must be able to enforce such orders under Section 401(b) if they are to be effective against reluctant state agencies.

The case for enforcing FCC orders against state commissions is particularly compelling when the order at issue deals with depreciation practices. The Communications Act requires the FCC to prescribe depreciation rates and practices only after notifying state commissions and receiving and considering the views and recommendations of those commissions. 47 U.S.C. 220(b) and (j). State commissions may seek clarification or reconsideration of depreciation orders and obtain judicial review if they believe themselves to be aggrieved. 47 U.S.C. 405, 402(a). The role of the state commissions in the process of prescribing depreciation rates is so significant and detailed as to foreclose any legitimate claim that Congress, after setting up the process, intended to immunize state commissions from enforcement of the resulting depreciation orders.

While it is reasonable to assume that most state agencies will comply voluntarily with lawful orders of the FCC, the experience of the FCC with its depreciation *Preemption Order* reveals that judicial enforcement is necessary in some cases. Even though the FCC's *Preemption Order* was under review in a court of appeals with authority to stay or enjoin its effectiveness, the

[12] The single exception was the FCC's attempt to preempt state regulation of the use of local leased access channels on cable television systems. *National Association of Regulatory Utility Commissioners* v. *FCC*, 533 F.2d 601 (D.C. Cir. 1976). The court of appeals reversed the FCC's decision in that case because it exceeded the FCC's limited authority to regulate cable television in ways that are " 'reasonably ancillary' " to the regulation of broadcast television (*id.* at 621-623 (Lumbard, J., concurring)).

Maryland commission and several other state agencies deliberately refused to comply without seeking interim judicial relief pending review. This practice constituted an evasion of the jurisdiction of the court of appeals and a considered defiance of the FCC's order—conduct that Section 401(b) was clearly designed to remedy. See *Southwestern Bell Telephone Co.* v. *Arkansas Public Service Commission*, 738 F.2d at 906, 908-909.[13]

Nor would a holding that state commissions are "persons" within the meaning of Section 401(b) authorize federal courts to interfere improperly in intrastate ratemaking.[14] In virtually every one of the enforcement cases prompted by the *Preemption Order*, the action of the district court was confined simply to ordering the state commission to permit the telephone company to use the

[13] It is no answer to assert (Br. 14 n.8) that enforcement against states is unnecessary under Section 401(b) because state courts will set aside state commission decisions that are contrary to federal law. The Communications Act's remedies are "in addition to" other remedies. 47 U.S.C. 414. Moreover, reliance on state court actions would seriously hinder the FCC in enforcement of its orders, since the FCC would have to confront varying state law requirements in order to obtain enforcement, rather than complying only with the clear and straightforward requirements of Section 401(b). Furthermore, reliance on enforcement in state courts would surely lead to the sort of inconsistent application decried by amici state commissions in arguing (Br. 8-10) that only the FCC should be permitted to enforce rulemaking orders. And, finally, there is no warrant for barring enforcement in federal courts "without some indication that Congress in fact wished to remit the litigation of a federal right to the state courts." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 n.8 (1979).

[14] The Maryland commission contends (Br. 20) that the Johnson Act, 28 U.S.C. 1342, evidences a federal policy against permitting federal courts to issue injunctions in state ratemaking proceedings. The Johnson Act does not foreclose federal court jurisdiction in this case, however, because jurisdiction is not based on diversity or on a claim that the state's rate order was unconstitutional, but on a federal statute expressly authorizing the district court to act. See *South Central Bell Telephone Co.*, 744 F.2d at 1123 n.28.

depreciation rates and methods prescribed by the FCC. In the one instance where the court was required to go further, its action was designed merely to protect the integrity of its original injunction.[15]

Finally, as we have shown (page 10, *supra*), there is no basis for doubt that the individual members of state commissions are "persons" within the meaning of Section 401(b). No reason is apparent to explain why, in that circumstance, Congress would not have intended equitable relief under that Section to be available also against the commissions themselves.

II. THE FCC'S *PREEMPTION ORDER* IS ENFORCEABLE UNDER SECTION 401(b)

Section 401(b) authorizes judicial enforcement of "any order of the Commission, other than for the payment of money." The statutory language does not except rulemaking orders; nor does it restrict enforcement to adjudicatory orders. Petitioner, adopting the reasoning of the First Circuit in *New England Telephone & Telegraph Co.* v. *Public Utilities Commission, supra* (Pet. App. 24a),

---

[15] See *South Central Bell Telephone Co.* In that case, the district court issued a preliminary injunction ordering the Louisiana commission to permit South Central Bell to use the depreciation rates prescribed by the FCC. The Louisiana commission responded by reducing the telephone company's rate of return, without further proceedings, so as to minimize the effect of the preliminary injunction. The district court concluded that the Louisiana commission deliberately had not complied with its order. The court, stressing that the commission had received no evidence before adjusting the rate of return, modified its injunction by ordering the commission to permit South Central Bell to increase its revenues in order to recover the entire amount the commission had determined was required on account of application of the depreciation practices prescribed by the FCC. The Fifth Circuit affirmed. *South Central Bell Telephone Co.* v. *Louisiana Public Service Commission*, 744 F.2d at 1113-1114, 1121-1122. Compare *New England Telephone & Telegraph Co.* v. *Public Utilities Commission*, 579 F. Supp. 1356, 1361-1362 (D. Me. 1984) (reasonable adjustment of rate of return in light of new depreciation procedures is permissible).

argues nonetheless that Section 401(b) does not authorize district courts to enforce FCC rulemaking orders.[16]

A. The Plain Meaning And Legislative Context Of Section 401(b) Show That Rulemaking Orders Are Enforceable Under That Section

Section 401(b) applies to "any order of the Commission other than for the payment of money." It refers to *any* order, making no distinction between adjudicatory orders and rulemaking orders. If Congress had intended to restrict Section 401(b) to the enforcement of adjudicatory orders, it could have written the statute more narrowly. Indeed, the fact that Congress expressly excluded orders for the payment of money from the otherwise comprehensive language of the enforcement statute strongly suggests that Congress intended the statute to apply to all other classes of FCC orders.[17]

This Court has assumed that Section 401 is available for the enforcement of regulations implemented under the Communications Act as a result of agency rulemaking. In *Ambassador, Inc.* v. *United States*, 325 U.S. 317, 325 & n.7. (1945), the Court affirmed a district court decision enjoining hotels from violating tariff regulations imposed by a telephone company, where the telephone company was complying with an FCC rulemaking order in imposing the regulations. Although the Court did not address the issue, it implicitly assumed that rulemaking orders could be enforced under Section 401(b).[18] See also

---

[16] The reading of Section 401(b) urged by the petitioner has been rejected by the Fourth Circuit (Pet. App. 4a-5a), the Fifth Circuit (744 F.2d at 1115-1119), and the three district courts that have addressed the issue (Louisiana, 570 F. Supp. at 236; Maine, 570 F. Supp. at 1571-1577; and Washington, 565 F. Supp. at 21). The First Circuit reversed the Maine district court's decision.

[17] Moreover, Congress limited some provisions of the Act expressly to adjudication. See, *e.g.*, 47 U.S.C. 409.

[18] The *Ambassador* opinion cites Section 401 as the source of judicial authority to restrain a violation of the tariff regulation. 325 U.S. at 325 & n.7. The suit must have been grounded on

Brookhaven Cable TV, Inc. v. *Kelly*, 428 F. Supp. 1216 (N.D.N.Y. 1977), aff'd, 573 F.2d 765 (2d Cir. 1978), cert. denied, 441 U.S. 904 (1979) (enforcing an FCC declaratory ruling that was entered in clarification of an order adopting rules for cable television).[19]

Both Section 401(b) and Section 402, the provision governing judicial review of FCC orders, use the phrase "any order of the Commission" to describe their applicability. It is well established, and the petitioner apparently concedes (Br. 29-30), that this phrase as used in Section 402 includes rulemaking "orders." See *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407, 417 (1942).[20] Thus, petitioner's argument runs counter to the

subsection 401(b), because violation by a telephone company's customer of a prescribed tariff regulation is not necessarily a violation of any provision of the Act itself, and subsection 401(a) is available only to enforce provisions of the Act. See *South Central Bell Telephone Co.*, 744 F.2d at 1117 n.18.

[19] Petitioner errs in relying on *Comtronics, Inc.* v. *Puerto Rico Telephone Co.*, 409 F. Supp. 800 (D.P.R. 1975), aff'd on other grounds, 553 F.2d 701 (1st Cir. 1977), and *Kroeger* v. *Stahl*, 148 F. Supp. 403 (D.N.J.), aff'd, 248 F.2d 121 (3d Cir. 1957), in arguing that "courts have historically declined to enforce FCC rules and regulations on behalf of private litigants" (Br. 32-33). No specific rulemaking order of the FCC appeared to be at issue in *Comtronics*. Rather, the plaintiff vaguely alleged that the defendant had violated FCC "holdings, rulings and policies" (409 F. Supp. at 804) by failing to connect its telephone lines to equipment sold by plaintiff. The court said nothing remotely suggesting that a rulemaking order is not enforceable under Section 401(b). In *Kroeger*, the plaintiff obtained a license from the FCC to conduct radio tests and then argued that the license was an FCC order that implicitly barred local authorities from denying his application for a variance to build a 75-foot radio mast on residential property. The court rejected that frivolous claim. By contrast, the *Preemption Order* here at issue specifically held that state commissioners were bound to comply with the FCC's depreciation rules.

[20] FCC rulemaking orders prescribing accounting methods and depreciation rates and practices have long been deemed reviewable. See, *e.g.*, *American Telephone & Telegraph Co.* v. *United States*, 299

"natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932). See, *e.g.*, *Bob Jones University* v. *United States*, 461 U.S. 574, 586-588 (1983).

There are no differences between Sections 402 and 401(b) that justify different treatment of these identical phrases. A principal reason for this Court's finding in *Columbia Broadcasting System, Inc.* that rulemaking orders are reviewable was that such orders are self-executing and require immediate compliance. 316 U.S. at 417-423. The same reasoning supports the conclusion that rulemaking orders should be enforceable. As the Fifth Circuit pointed out, "[s]ubstantial unfairness can result from either compliance with an improper regulation or noncompliance with a proper one." 744 F.2d at 1118. Indeed, acceptance of petitioner's argument would create the anomalous situation in which a state commission (or any other party) could seek review of an FCC order adopting rules, lose its case on the merits, and still avoid enforcement pursuant to Section 401(b) until and unless the FCC went through further administrative procedures to generate a specific adjudicatory order that could be enforced.[21]

U.S. 232 (1936). Similarly, FCC orders declaring the preemptive effect of the Commission's substantive rules and policies have been reviewed without suggestion that the court of appeals lacked jurisdiction. See, *e.g.*, *North Carolina Utilities Commission* v. *FCC*, 537 F.2d 787 (4th Cir. 1976).

[21] Moreover, this case cannot accurately be regarded as one seeking enforcement of an abstract rule. Although the *Preemption Order* was adopted in a rulemaking docket, that order disposed of particular requests for declaratory relief as to the meaning and applicability of the FCC's substantive rules, both in general and in the particular context of a dispute between the Ohio commission and a telephone company. The Administrative Procedure Act (APA) authorizes the FCC to issue declaratory rulings to terminate controversy or remove uncertainty, and provides that such orders

Petitioner's argument is also contrary to the FCC's consistent interpretation of Section 408 of the Act, which provides that "all orders of the Commission, other than orders for the payment of money," become effective thirty days after the date "public notice of the order is given." The FCC has regarded this statute as governing the effectiveness of rulemaking orders. See 47 C.F.R. 1.427. Petitioner would have this Court conclude that although FCC rulemaking orders are effective under Section 408 and reviewable under Section 402(a), they are nonetheless unenforceable under Section 401(b), even though these provisions use identical language. The anomaly of this contention is apparent: an unenforceable order is ineffective against anyone who chooses to disregard it.[22]

have "like effect as in the case of other orders." 5 U.S.C. 554(e). In addition, the FCC in a 1982 depreciation proceeding involving several individual carriers, specifically prescribed depreciation rates and practices for C&P in Maryland and specifically declared the preemptive effect of those prescriptions. *In re Prescription of Revised Percentages of Depreciation*, 92 F.C.C.2d at 700. Whatever merit a narrow interpretation of "order" might have in the (perhaps unrealistic) context of an attempt to enforce an abstract rule, it would elevate form over the substance of the FCC's actions here to hold those actions unenforceable. The particular method by which the FCC has adopted its order—rulemaking or adjudication—is not conclusive; "it is the substance of what the Commission has purported to do and has done which is decisive." *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. at 416.

[22] The cases petitioner cites (Br. 33-34) that were decided under Section 16(12) of the Interstate Commerce Act do not support its argument that rulemaking orders are not "orders" under Section 401(b). In *McFaddin Express, Inc.* v. *Adley Corp.*, 346 F.2d 424, 426 (2d Cir. 1965), cert. denied, 382 U.S. 1026 (1966), the plaintiff contended that the defendant had violated a management contract that had been authorized by the ICC. In *Farmers' Loan & Trust Co.* v. *Northern Pac. Ry.*, 83 F. 249 (D. Wash. 1897), the order at issue was directed at two specific railroads. Neither case involved any rulemaking order or other order comparable to the *Preemption Order*. This Court's statement in *Illinois Cent. R.R.* v. *Public Utilities Commission*, 245 U.S. 493, 502 (1918), that "[i]n common acceptation a suit to enforce an order of the [ICC] is one which seeks to compel the carrier to whom the order is directed to yield obedience to its command" is also irrelevant. As we have noted (page 14, *supra*), Section 16(12) applied to disobedience by "carriers" rather than by "persons." The Court made the statement petitioner quotes, not in order to address any question relevant to a distinction between rulemaking and adjudicatory orders, but because, in *Illinois Cent. R.R.*, the suit was brought "by the carriers, not against them" (245 U.S. at 503).

Moreover, as the Fifth Circuit noted in *South Central Bell* (744 F.2d at 1118 n.20), the cases construing Section 16(12) support its conclusion that Congress did not intend to exclude rulemaking orders from enforcement under Section 401(b). In *Pacific Fruit Express Co.* v. *Akron, C. & Y. R.R.*, 524 F.2d 1025 (9th Cir. 1975), cert. denied, 424 U.S. 911 (1976), an order directed generally at all rail carriers using protective services was at issue. The court concluded that "the District Court, pursuant to the broad power to compel obedience under § 16(12) * * *, had the power to mandate compliance with that order" (524 F.2d at 1031). Similarly, *United States* v. *City of Jackson*, 318 F.2d 1 (5th Cir. 1963), involved a general order forbidding carriers to use segregated facilities. The court found that order enforceable under Section 16(12) (318 F.2d at 9).

Finally, there is no merit to petitioner's attempt to use the Administrative Procedure Act's definition of the word "order" to interpret Section 401(b). Neither the Communications Act nor the APA suggests that the APA definitions are relevant in interpreting the Communications Act.[23] There is no reason to engraft the APA's definition of "order" onto Section 401(b) in the absence of statutory language requiring it or at least some reference in the legislative history indicating that this was Congress's intention. This is especially so since the distinction between rulemaking and adjudication in the APA's definition of "order" is designed to indicate what agency procedures apply to a given administrative undertaking, not whether agency actions are enforceable.[24] Petitioner

[23] The APA's definition section states that its definitions are "[f]or the purpose of this subchapter." 5 U.S.C. 551. The Communications Act has its own definition provisions, although they do not define "order." 47 U.S.C. (& Supp. I) 153.

[24] It is noteworthy that where the APA deals with matters other than agency procedures, such as the provisions for judicial review,

has shown no basis for applying a distinction regarding procedural matters in one statute to the enforcement provisions of another statute.

B. Effective Implementation Of The Act Is Enhanced By Enforceability Of Rulemaking Orders Under Section 401(b)

Petitioner primarily relies on policy arguments [25] in contending (Br. 34) that only the FCC, and not private parties, should be permitted to enforce rulemaking orders.[26] However, policy considerations under the statute actually support the opposite conclusion.

It is true that the FCC is primarily responsible for enforcement of the Act and for developing a coherent

---

it does not use the term "order." In defining those actions that are reviewable in court, the APA uses the term "agency action" and does not distinguish between adjudicatory and rulemaking actions. 5 U.S.C. 701-705.

[25] Of course, this Court has no policy-making role that would permit it to ignore the plain language of the statute. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941).

[26] If rulemaking orders are not enforceable under Section 401(b), then it is not clear that they are judicially enforceable at all. No other provision of the Act explicitly applies to the enforcement of FCC orders, other than the narrow provisions for enforcement of orders for the payment of money and subpoenas. 47 U.S.C. 407, 504(a), 409(g). The Maryland Commission and amici assume that rulemaking orders are enforceable under Section 401(a), which applies to "violation of any of the provisions of this chapter by any person," because "rulemaking orders are the functional equivalent of the provisions of the Act itself" (Amici Br. 6; see Br. 32 ("enforcement of FCC 'rules and regulations' in effect constitutes enforcement of the Act itself")). But it is not at all clear that all violations of rulemaking orders are also violations "of the provisions of this chapter"—indeed it is much more natural to describe such a violation as a violation of an "order of the Commission other than for the payment of money" as specified in Section 401(b). If rulemaking orders are not enforceable at all, then there is a large gap in the enforcement provisions of the Act, which petitioner does not defend as a policy matter.

communications policy.[27] However, permitting the courts to enforce FCC rulemaking orders in actions brought by private parties pursuant to the specific procedures in Section 401(b) does not conflict with the FCC's responsibilities. Rather, the very justification for private enforcement statutes such as Section 401(b) is that the agency may not have the resources to police every violation of its orders and that private parties aggrieved by such violations can help to do so. Cf. *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 477 (1940) (one with a financial stake in a matter before the agency may be the only one with sufficient interest to prosecute it to completion).

The narrow function of the district court in Section 401(b) enforcement actions ensures that the court need not encroach on the agency's responsibilities. Under Section 401(b), the only questions for the enforcing court are whether the FCC's order was properly entered and duly served or published, whether the defendant has violated it, and whether the complainant has been injured by the violation. These questions normally will be readily answered without substantial judicial inquiry into regulatory matters. If questions regarding communications policy arise, the enforcing court can and should either refer such questions to the FCC under the doctrine of primary

---

[27] The Maryland commission's assertion that "only the FCC can enforce the Act" (Br. 32) overlooks several statutes authorizing private actions to vindicate rights under the Act and regulations adopted in implementation of the Act. For example, Section 207 authorizes complaints either to the FCC or to a district court alleging damages as a result of violations by carriers and empowers the court to award damages and attorneys' fees. Section 406 authorizes private suits in district courts to obtain service on a nondiscriminatory basis from carriers subject to the Act. Thus, while it is true that the FCC has principal responsibility for enforcing the Act, it is incorrect to base a narrow interpretation of Section 401(b) on the premise that *only* the FCC can enforce the Act and its regulations.

jurisdiction or solicit the FCC's views as an intervenor or as amicus curiae.[28] In this way, the FCC's role as primary interpreter of the Communications Act is preserved, and the district court may fulfill the particular responsibilities Congress conferred on it in Section 401(b).

Agencies such as the FCC have broad discretion to use either rulemaking or case-by-case adjudication (or some combination of the two) to carry out their statutory responsibilities. See *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947). That discretion would be unduly restricted, to the detriment of efficient administration of the Act, if the Commission could not adopt self-executing rules to implement the statute and rely in part on private enforcement actions for their effectuation.

Under the First Circuit's view of Section 401(b) (Pet. App. 39a), the FCC could conduct separate adjudicatory proceedings as each state refused to permit its local telephone companies to use the depreciation rates and methods prescribed by the FCC, issue specific orders to each state commission, and thereafter obtain enforcement in the courts. There is no reason to require such redundant procedures, as this case demonstrates. The FCC has issued detailed and particularized orders requiring certain depreciation rates for C&P, and it has declared the preemptive effect of its depreciation orders. The Maryland commission did not seek judicial review of the pertinent orders, but simply went its own way in disregard

[28] In most of the enforcement cases that have arisen under the *Preemption Order*, the FCC has been invited to participate as amicus curiae and has done so. *E.g., South Central Bell Telephone Co.*, 744 F.2d at 1118. Under some circumstances, a failure by the district court to obtain the views of the FCC may be reversible error. See *MCI Communications Corp.* v. *AT & T*, 496 F.2d 214 (3d Cir. 1974) (district court injunction under Section 406 vacated because the matter should have been referred to FCC under doctrine of primary jurisdiction to develop important policy views).

of them. A further order or action by the FCC to vest the district court with enforcement authority could be no more specific than the orders already issued and would only produce delay.

Finally, there is no merit to the First Circuit's somewhat inconsistent concern (Pet. App. 34a-35a) that permitting private enforcement of FCC rulemaking orders such as the ones involved here will produce piecemeal review of state ratemaking proceedings.[29] Enforcement actions under Section 401(b), whether brought by private persons or by the FCC itself, do not require or authorize the federal district courts to engage in "review" of state rate proceedings. Under the statute, the role of the district courts is confined to enforcement of an FCC order.

[29] The fact that a telephone company such as C&P might challenge a state commission's ratemaking order in state courts does not detract from its right to seek relief in the federal district court insofar as the state ratemaking order involves violation of an FCC order. The Communications Act does not abridge or alter remedies already existing at common law or by statute, but its provisions "are in addition to such remedies." 47 U.S.C. 414.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

JACK D. SMITH
General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

JOHN E. INGLE
Deputy Associate General Counsel

JANE E. MAGO
Counsel
Federal Communications Commission

OCTOBER 1985

☆ U. S. GOVERNMENT PRINTING OFFICE; 1985 491507 20029